TAN WEI MIA & ORS v. PENGARAH TANAH DAN GALIAN SELANGOR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-176-04-2022]
8 AUGUST 2024

Abstract – *The decision to grant a lease under s. 63 of the National Land Code ('NLC') is made by the State Authority. Therefore, in a judicial review application to compel the granting of a lease under s. 63 of the NLC, the correct party to be named is the State Authority, and not anyone else. Misnaming of parties would cause the judicial review application to be an abuse of process of the court, since any other parties would not have the jurisdiction to grant the said lease sought.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Orders of declaration, certiorari and mandamus – Application to bound Director of Land and Mines, Chief Minister, Land Administrator, concessionaire of expressway project and Highway Authority to terms of consent orders – Consent orders provided said parties ought to grant applicants lease of certain areas of land pursuant to s. 63 of National Land Code – Whether said parties had jurisdiction to grant lease sought – Whether correct parties named – Whether said parties could be compelled to give effect to terms of consent orders – Whether judicial review application abuse of process of court*

The applicants were the executors and trustees of the estate of one Tan Bok Yin. In their capacity as such, the applicants were also the registered proprietors of the lands located in Gombak, Selangor, which were known as 'Lots 841 and 843'. The first to eighth respondents, respectively, were the Director of Land and Mines of the State of Selangor, the Chief Minister of Selangor, the Land Administrator of the Gombak District, the concessionaire for the Sungai Besi-Ulu Kelang Expressway Project ('SUKE project'), the Highway Authority of Malaysia, the Minister of Works, the Federal Lands Commissioner and the Ampang Jaya Municipal Council. Pursuant to a declaration by the first respondent, part of Lots 841 and 843 were acquired under the Land Acquisition Act 1960 for the purpose of constructing the SUKE project. Dissatisfied, the applicants commenced a judicial review application in the High Court against the said declaration of acquisition on the ground that the acquisition was not made for a public purpose. There, the applicants and the first to fourth respondents entered into a consent order ('HC consent order') where its paras. 1.6 and 1.7 stated: (i) the fourth respondent, subject to the approval by the fifth, sixth and eighth respondents, undertook to provide for the applicants a lease under s. 63 of the National Land Code ('NLC') in respect of areas which were shaded in red in Annexure 1 of the HC consent order; (ii) the lease to be granted was

A inclusive of the right of airspace of the said areas; and (iii) the first to third respondents undertook to give effect to the terms of the HC consent order. Subsequently, the fourth respondent failed to fulfil the said undertakings. This prompted the applicant to commence an application under O. 45 rr. 6 and 7 of the Rules of Court 2012 to fix a time limit for the compliance of
B the undertaking by the fourth respondent. Later, the said application was dismissed by the High Court. The applicants then lodged an appeal to the Court of Appeal, hence, the said parties entered into another consent judgment ('COA consent judgment') where its para. 4 provided that the first to third respondents undertook to fulfil paras. 1.6 and 1.7 of the HC consent
C order, subject to the approval by the sixth and seventh respondents and the laws in force. Afterwards, the applicants sent an online application to the fifth respondent for approval of the lease sought, however, *via* a letter, they contended that the fifth respondent had rejected it ('16 August 2021 application'). Other than that, the applicants had also sent a letter to the fifth respondent to request for its compliance with the terms of the consent orders,
D but no response was ever received from the fifth respondent ('1 March 2022 letter'). Aggrieved, the applicants then filed the present application for judicial review. In this application, the applicants sought for: (i) a declaration that the first to fourth respondents were bound by the terms of the consent orders; (ii) a declaration that the first to fourth respondents breached their
E undertakings of the terms of the consent orders by failing to grant the applicants the lease sought; (iii) a declaration that the applicants were entitled to be granted the lease sought; (iv) a declaration that the fifth respondent had control over any reserved land under s. 63 of the NLC; (v) a declaration that approvals by the sixth to eighth respondents were not required under s. 63
F of the NLC; (vi) an order of *certiorari* to quash the decision of the fifth respondent to reject the lease sought; (vii) an order of *mandamus* to compel the fifth respondent to approve the lease sought; (viii) an order of *mandamus* to compel the first, second and/or third respondents to grant the applicants the lease sought; and (ix) in the alternative to paras. (vii) and (viii), an order
G of *mandamus* to compel the first, second and/or third respondent to grant the applicants a temporary occupation licence ('TOL') for the areas shaded in red in Annexure 1 of the HC consent order.

Held (dismissing application):

H **(1)** Based on the COA consent order, there was no obligation on the fourth respondent, but on the first to third respondents to grant the said lease under s. 63 of the NLC. The fourth respondent's obligation had been extinguished by the COA consent order. Therefore, on the facts of the case, particularly the clear terms of the COA consent order, there was
I no case against the fourth respondent, and the applicants were not entitled to any relief against the fourth respondent. The case against the fourth respondent was plainly an abuse of the process of the court. (para 21)

(2) The decision to grant a lease under s. 63 of the NLC is made by the State Authority, and not by anyone else. The first to third respondents have no jurisdiction to grant leases under s. 63 of the NLC. As per s. 5 of the NLC, the State Authority refers to the 'Ruler or Yang di-Pertua Negeri of the State, as the case may be.' The State Executive Council of Selangor ('State EXCO') is the Executive organ which exercises Executive functions in the name of the Ruler. Thus, when an Executive function is to be exercised by the State Authority, such function will be carried out by the State EXCO. Furthermore, the first to third respondents cannot bind the State Authority. When the NLC provides that any decision is to be made by the State Authority, the first to third respondents have no powers to bind the State Authority. Any agreement, even by way of a consent order of a court, is unable to bind the State Authority. Such agreement is in breach of an express statutory provision of law and will be an illegal agreement. (paras 26-28)

(3) When the COA consent order was entered, the State Authority had not yet by notification in the *Gazette* reserved the lands in question under s. 62 of the NLC. Even during the hearing of these judicial review proceedings, no such notification had been made in the *Gazette*. This meant that the lands were still vested in the State of Selangor as State lands. Thus, until the notification was made in the *Gazette*, no lease could be granted under s. 63 of the NLC, even by the State Authority. Asking for the reliefs sought to be granted against the first to third respondents were in violation of s. 63 of the NLC, and an illegal act. The present judicial review proceedings were an abuse of the process of the court. (paras 29 & 30)

(4) The consent orders were final orders. Granting the declarations to the effect that the first to third respondents were bound by the terms of the consent orders were unnecessary. This was not the purpose of judicial review proceedings. The parties were already bound by the terms of the COA consent order. Moreover, the declarations themselves were against para. 4 of the COA consent order, which was a conditional order, *ie*, subject to the approval by the sixth and seventh respondents and the laws in force. The court should refrain from making the declarations sought against the first to fourth respondents as those declarations were also an abuse of the process of the court. (paras 31 & 32)

(5) It was contended that the 16 August 2021 application was an application for the approval of the lease sought by the fifth defendant. This was not true. An examination of the said application showed that it was an online application to the fifth respondent for approval for the right of way and use of the land as a private car park and green park beside and under the elevated part of the SUKE project. Further, the said application was forwarded by the fifth respondent to the sixth respondent because the power laid with the sixth respondent to approve

A or otherwise of such applications under s. 85 of the NLC. Whatever it was, neither the fifth respondent nor the sixth respondent had made any decision on whether to grant or reject the lease sought under s. 63 of the NLC. Therefore, the relief of *certiorari* to quash the decision of the fifth respondent to reject the application for the lease sought was B misconceived in law. Neither could an order of *mandamus* be granted to compel the fifth respondent to approve the lease sought as the fifth respondent had no such jurisdiction. (paras 33, 35 & 36)

(6) Through the 1 March 2022 letter, the applicants requested the fifth respondent to comply with paras. 1.6 and 1.7 of the HC consent order C and para. 4 of the COA consent order. The applicants requested the fifth respondent to process the application for the consideration of the seventh respondent. However, this was not what para. 4 of the COA consent order provided. Clearly, the said consent order did not refer to the fifth respondent at all. The 1 March 2022 letter had requested the D fifth respondent to do something which the COA consent order did not require it to do. Thus, there was nothing done by the fifth respondent to review. In the circumstances, the proceedings brought against the fifth respondent were an abuse of the process of the court. (paras 37 & 38)

(7) The pre-requisites of *mandamus* must be fulfilled before such an order E could be made. In this case, the pre-requisites were not fulfilled as there was no provision in any written law which imposed a legal duty on the first to third respondents to do what the applicants were asking. The applicants must have a legal right to the performance of such duty against the first to third respondents. Other than that, the grant of a TOL F under the NLC was pursuant to a power and not a duty. This is clear from the wording of s. 65(1) of the NLC. For these reasons, the relief sought by the applicants were denied. (paras 40 & 41)

(8) The seventh and eighth respondents were not parties in the judicial review proceedings which resulted in the HC and COA consent orders. G Both respondents were named in the body of the consent orders without their knowledge or heard on the matter. In any event, both respondents had no jurisdiction to grant a lease under s. 63 of the NLC as the jurisdiction was with the State Authority. The seventh and eighth respondents were unnecessarily made as parties in the instant judicial H review proceedings. (para 43)

(9) The appropriate relief for the applicants was compensation for the acquired land according to the remedy as provided under art. 13 of the Federal Constitution. As such, the present application for judicial review was dismissed with costs. (paras 44 & 45)

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Case(s) referred to:

Chong Kueng Ying & Ors v. Louis Lavagna [1972] CLJU 18; [1972] 1 LNS 18 FC ***(refd)***

Datuk Bandar Majlis Bandaraya Shah Alam & Anor v. Yusuf Awang & Ors [2007] 4 CLJ 253 CA ***(refd)***

Government Of The State Of Negeri Sembilan v. Yap Chong Lan & Ors & Another Case [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144 FC ***(refd)***

Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia [2017] 10 CLJ 36 CA ***(refd)***

Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj [2011] 9 CLJ 645 CA ***(refd)***

Legislation referred to:

Federal Constitution, arts. 8(1), 13(1)

National Land Code, ss. 5, 62, 63, 65(1), 66, 67, 85, First Schedule Forms 4A, 4E

Rules of Court 2012, O. 45 rr. 6, 7, O. 53

For the applicant - Joseph Khor, Choo Mun Wei & Denise Phang; M/s Mah Weng Kwai & Assocs

For the 1st, 2nd & 3rd respondents - Etty Eliany Tesno; SLA, Selangor

For the 6th & 7th respondents - Mohd Izhanudin Alias; SFC

For the 4th & 8th respondents - Loshini Ramarmuty & Eric Gabriel Gomez; M/s Skrine

For the 5th respondent - Jeremy Khalif Lee, Lee Yee Teng & Wong Wei Tzen; M/s Nadzarin Kuok Puthucheary & Tan

Reported by Syamim Ariffin

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] It will be seen that this is not the usual judicial review proceedings where the public body or authority's decision, action, or omission in public law is complained of but rather whether a public body or authority has complied with the terms of a consent order entered into by some and not all of the respondents herein. Apart from that, these judicial review proceedings also concern the importance of identifying the proper decision-maker and the decision sought to be reviewed.

[2] On 5 February 2024, I dismissed the applicants' application for judicial review for the following reliefs:

(i) a declaration that the first, second, third and fourth respondents are bound by the terms as stated in the consent order dated 3 December 2016 at the High Court at Kuala Lumpur in Application for Judicial Review No. WA-25-8-01-2016 ("the High Court consent order") and the consent order dated 7 March 2019 in the Court of Appeal, Civil Appeal No. W-01(A)-440-07-2018 ("Court of Appeal consent order");

(ii) a declaration that the first, second, third and fourth respondents have breached their undertaking as stated in paras. 1 and 2 of the High Court consent order and para. 4 of the Court of Appeal consent order

A by failing to grant or cause to grant a lease under s. 63 of the National Land Code ("NLC") over the areas of land (inclusive of the right to airspace) shaded in red in Annexure 1 of the High Court consent order ("Annexure 1") to the applicants;

(iii) a declaration that the applicants are entitled to be granted a lease under
B s. 63 of the NLC over the areas of land (inclusive of the right to airspace) shaded in red in Annexure 1 of the High Court consent order;

(iv) a declaration that the fifth respondent is an officer for the time being having the control of any reserved land under s. 63 of the NLC;

C (v) a declaration that the approval of the sixth, seventh and eighth respondents is not required under s. 63 of the NLC;

(vi) an order of *certiorari* to quash the decision of the fifth respondent in rejecting the applicants' application for approval for the grant of a lease under s. 63 of the NLC over the areas of land (inclusive of the
D right to airspace) shaded in red in Annexure 1 to the applicants (hereinafter referred to as the "application for approval");

(vii) an order of *mandamus* to compel the fifth respondent to grant the applicants its approval for the grant of a lease under s. 63 of the NLC over the areas of land (inclusive of the right to airspace) shaded in red
E in Annexure 1;

(viii) an order of *mandamus* to compel the first, second and/or third respondent to grant the applicants a lease under s. 63 of the NLC over the areas of land (inclusive of the right to airspace) shaded in red in
F Annexure 1 in Form 4E of the First Schedule of NLC; and

(ix) in the alternative to paras. (vii) and (viii), an order of *mandamus* to compel the first, second and/or third respondent to grant a temporary occupation licence under ss. 65 to 67 of the NLC over the areas of land (inclusive of the right to airspace) shaded in red in Annexure 1
G in Form 4A of the First Schedule of NLC.

[3] The reasons for my decision are as follows.

The Parties

[4] The applicants are Tan Wei Mia, Tan Wai Cheong, and Tan Boon
H Chit. They are the registered proprietors of the lands held under Grant No. 47967 Lot No. 841 and Grant No. 47969 Lot No. 843, Mukim Ulu Kelang, Daerah Gombak, Negeri Selangor ("Lot 841 and Lot 843"), in their capacity as executors and trustees of the estate of Tan Bok Yin @ Tan Hon Yin, deceased.

I **[5]** Lots 841 and 843 were partly acquired under the Land Acquisition Act 1960 ("LAA") for the purpose of building an expressway (parts of which are elevated). The expressway is known as the Sungai Besi-Ulu Kelang

Expressway or SUKE ("the SUKE project"). The first respondent is the Director of Land and Mines of the State of Selangor, the party that declared the part-acquisition of Lots 841 and 843. The second respondent is the Menteri Besar of Selangor. The third respondent is the Land Administrator of Gombak District, Selangor. The fourth respondent is the concessionaire for the SUKE project.

[6] The fifth respondent is the Highway Authority of Malaysia, a statutory body, established under the Highway Authority Malaysia (Incorporation) Act 1980. The sixth respondent is the Minister of Works. The seventh respondent is the Federal Lands Commissioner established under the Federal Lands Commissioner Act 1957. The eighth respondent is a Local Authority as defined in the Local Government Act 1976 and Lots 841 and 843 falls within its jurisdiction.

Background Facts

[7] The applicants commenced judicial review proceedings in this court *vide* application for Judicial Review No. WA-25-8-01-2016 ("JR 2016") to quash the decision to acquire parts of Lots 841 and 843 for the SUKE project. The parties in JR 2016 were the applicants and the first, second, third and fourth respondents. The fifth, sixth, seventh and eighth respondents herein were not parties to JR 2016. JR 2016 was to declare the acquisition of the lands not for a public purpose. However, on 7 December 2016, the parties in JR 2016 entered into a consent order ("the High Court consent order"). The terms of the High Court consent order read as follows:

> 1. Responden Ke-4 mengaku janji untuk membekalkan yang berikut kepada pemohon-pemohon, *tertakluk kepada kelulusan daripada Lembaga Lebuhraya Malaysia, Jabatan Kerja Raya dan Majlis Perbandaran Ampang Jay a (5th, 6th and 8th respondents):*
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> 1.1. Akses-akses sedia ada kepada tanah-tanah yang dipegang di bawah Geran No. 47967 Lot No. 841, Mukim Ulu Kelang, Daerah Gombak, Negeri Selangor ('Tanah-Tanah yang Dijadualkan'), seperti yang ditandakan dengan 'W' di dalam Lampiran 1 di sini hendaklah dikekalkan, tanpa gangguan oleh Projek SUKE.
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> 1.2 Pembinaan akses-akses baru kepada Tanah-Tanah yang Dijadualkan, seperti yang ditandakan dengan 'X' di dalam Lampiran 1 di sini.
>
> 1.3 Pembinaan sebatang jalan masuk dengan 4 lorong dan 2 hala, yang menghala ke akses baru ke tanah yang dipegang di bawah Geran No. 47967, Lot No. 841. Mukim Ulu Kelang, Daerah Gombak, Negeri Selangor ('Lot 841'), seperti yang ditandakan dengan 'Y' di dalam Lampiran 1 di sini, atas kos dan perbelanjaan Responden Ke-4.

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1.4 Pembinaan 1 bulatan di atas tanah yang dipegang di bawah Geran No. 47967, Lot No. 843, Mukim Ulu Kelang, Daerah Gombak, Negeri Selangor ('Lot 843') seperti yang ditandakan dengan 'Z' di dalam Lampiran 1, di sini, atas kos dan perbelanjaan Responden Ke-4.

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1.5 Pengurangan cenderung cerun di Lot 843 dan Geran No. 47970, Lot No. 844, Mukim Ulu Kelang, Daerah Gombak, Negeri Selangor, seperti yang ditunjukkan dengan warna hijau di dalam Lampiran 1 di sini, supaya bahagian tersebut berada di aras yang sama dengan bulatan tersebut, atas kos dan perbelanjaan Responden Ke-4.

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1.6 Pemberian pajakan menurut Seksyen 63 Kanun Tanah Negara kepada Pemohon-Pemohon, atas kawasan yang diwarnakan merah didalam Lampiran 1.

1.7 Pemberian hak kepada ruang udara di atas kawasan yang diwarnakan merah di dalam Lampiran 1 kepada Pemohon-

D

Pemohon.

2. *Tertakluk kepada peruntukan undang-undang, Responden-Responden Pertama hingga Ke-3 mengaku janji untuk mengambil langkah dan tindakan yang perlu untuk memberi efek kepada Penghakiman Persetujuan ini.* (emphasis added)

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[8] Subsequently, on 16 March 2018, due to the fourth respondent failing to fulfil its undertaking provided in paras. 1.6 and 1.7 of the High Court consent order, the applicants filed a notice of application under O. 45 rr. 6 and 7 of the Rules of Court 2012 to fix a time limit for the compliance of the undertaking. On 7 June 2018, the learned High Court Judge dismissed

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the application. The applicants appealed to the Court of Appeal against the said dismissal.

[9] On 7 March 2019, the parties (*ie*, the applicants and the first, second, third and fourth respondents) entered into a consent order in the Court of Appeal ("the Court of Appeal consent order"). The relevant term of the

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consent order, which concerns the subject matter of the instant judicial review proceedings, concerns the grant of a lease, including the right to airspace in favour of the estate of the deceased. The relevant term is para. 4, which provides as follows:

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Bagi perenggan 1.6 dan 1.7 Perintah Persetujuan MT, tertakluk kepada kelulusan Persuruhjaya Tanah Persekutuan, Kementerian Kerja Raya dan undang-undang yang berkuatkuasa, Responden Pertama hingga Responden Ke-3 hendaklah memberi pajakan dan hak yang diperihalkan dalamnya kepada Perayu-Perayu.

Application Made To The Fifth Respondent

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[10] On or about 16 August 2021, the applicants claimed to have made an application online to the fifth respondent *ie*, the Highway Authority of Malaysia for the approval of the lease sought under s. 63 of the NLC in

respect of the land mentioned in the High Court consent order ("the online application"). A

[11] Thereafter, the applicants alleged to have been informed in a letter dated 31 January 2022 that their application was not approved. This letter was only communicated to the third applicant on 3 February 2022. For its importance, the relevant parts of the letter are reproduced: B

> Tuan
>
> E19: Lebuhraya Bertingkat Sungai Besi-Ulu Kelang (SUKE)
>
> Permohonan Aktiviti Penggunan Right Of Way (R.O.W) Lebuh Raya Bagi Cadangan Tempat Letak Kenderaan Persendirian Dan Taman Hijau Berhampiran Lot 841, 842, 843, 844, Mukim Ulu Kelang, Daerah Gombak, Selangor Darul Eshan C
>
> No. Projek: eptl/SUKE/2021/217
>
> Dengan hormatnya merujuk kepada perkara di atas dan permohonan tuan adalah berkaitan. D
>
> 2. Pihak kami telah menimbang permohonan cadangan penggunan R.O.W di bawah struktur Lebuhraya SUKE dan adalah dimaklumkan bahawa permohonan tuan untuk cadangan tersebut tidak diluluskan.
>
> 3. Sekian terima kasih E

[12] It is clear from the reference of the letter, that the subject matter was an application for approval for a "right of way" for a proposed private car park and a green park beside and under the elevated section of the SUKE Expressway. This application is certainly not for a lease or specifically a lease under s. 63 of the NLC. One month later, on 1 March 2022, the applicants sent a letter to the Highway Authority of Malaysia which read as follows: F

> Tuan,
>
> Pemberian Pajakan Di Bawah Seksyen 63, Kanun Tanah Negara 1965 Untuk Sebahagian Tanah-tanah Yang Telah Diambilmilikan Untuk Projek SUKE. G
>
> Dengan segala hormatnya, kami ingin merujuk kepada perkara di atas dan terutama Perenggan 1.6 dan 1.7, Perintah Persetujuan Bermeterai Mahkamah Tinggi bertarikh 07.12.2016 dan Perenggan 4, Perintah Persetujuan Bermeterai Mahkamah Rayuan bertarikh 07.03.2019. H
>
> 2. Mengikut Perenggan 1.6 dan 1.7, Perintah Persetujuan Bermeterai Mahkamah Tinggi tersebut, Lembaga Lebuhraya Malaysia dikehendaki memproses permohonan pajakan menurut Seksyen 63 Kanun Tanah Negara dan pemberian hak ruang udara di atas Kawasan yang diwarnakan merah seperti dalam Lampiran 1 yang dikepilkan sebagai mukasurat 2 surat ini. Lembaga Lebuhraya Malaysia dikehendaki memproses I

permohonan-permohonan untuk pertimbangan Pesuruhjaya Tanah Persekutuan menurut Perenggan 4, Perintah Persetujuan Bermeterai Mahkamah Rayuan bertarikh 07.03.2019.

Kami berharap pihak tuan boleh mematuhi kedua-dua Perintah Mahkamah Persetujuan dengan segera.

Sekian terima kasih

[13] It is clear from the reference of the letter that the subject matter was for the granting of a lease under s. 63 of the NLC based on the High Court consent order and the Court of Appeal consent order. It is in this letter that the applicants requested the fifth respondent, *ie*, the Highway Authority of Malaysia to comply with the terms of the said consent orders. There was no response to this letter by the Highway Authority of Malaysia. Hence, the instant application for judicial review.

Grounds For Judicial Review

[14] The grounds for judicial review in the O. 53 statement were framed in the following words:

(i) legitimate expectation. In view of the High Court consent order and the Court of Appeal consent order, which provided that the applicants be granted a lease under s. 63 of the National Land Code over the areas stipulated in Annexure 1 of the High Court consent order had given rise to a legitimate expectation that the respondents would abide by the said consent orders.

(ii) failure to provide reasons. There were no reasons provided by the fifth respondent for rejecting the application for the grant of the lease.

(iii) irrationality. The following complaints were put forth under this heading:

(a) the decision of the fifth respondent in refusing to grant the lease is tainted with irrationality in that it failed to take into account relevant considerations and instead had taken into account irrelevant considerations or had acted in a manner so unreasonable that no reasonable authority would have made such a decision;

(b) the first, second, third and fourth respondents failed to perform their obligations as per the undertaking given in paras. 1 and 2 of the High Court consent order and para. 4 of the Court of Appeal consent order;

(c) the rejection of the application to grant the lease by the fifth respondent amounts to an indirect deprivation of the applicant's right to adequate compensation under art. 13(1) of the Federal Constitution and that the arbitrary nature of the rejection of the grant of lease is a violation of the right of equality under art. 8(1) of the Federal Constitution.

Analysis And Decision

[15] After considering the applicants' case, as framed in the O. 53 statement, the affidavits filed, the documentary exhibits produced therein, and the written submissions of all the parties, I found that the instant judicial review proceedings were an abuse of the process of the court and a clear instance and/or a case where this court ought not or should not exercise its discretion based on the facts and circumstances of this case.

The Applicants' Case

[16] The starting point is the applicants' case encapsulated in their executive summary. There, it was submitted that under both the consent orders, the first, second, third and fourth respondents were obliged to ensure that a lease under s. 63 of the NLC in the stipulated area is made in favour of the estate of the deceased. It was alleged that the first, second, third and fourth respondents failed to fulfil their obligation and had therefore breached the terms of both the consent orders concerning the granting of the lease. On this basis, the applicants raised the following grounds to support the reliefs they are claiming: (i) the applicants had a legitimate expectation that the terms of both the consent orders would be complied with by the first, second, third and fourth respondents; and (ii) the failure of the first, second, third and fourth respondents to provide the lease under s. 63 of the NLC under the consent orders. I refer to this part of the applicants' case as the review against the first, second, third, and fourth respondents.

[17] The applicants then submitted that the rejection of their online application for the grant of the lease under s. 63 of the NLC by the fifth and sixth respondents amounted to a deprivation of the right to property and adequate compensation under art. 13 of the Federal Constitution. The rejection of the application was also irrational on the basis that no reasons were provided for the rejection of the lease. I refer to this part of the applicants' case as the review against the fifth and sixth respondents.

[18] There was clearly no review sought against the seventh and eighth respondents.

Review Against The First, Second, Third And Fourth Respondents

[19] The applicants' case against the first, second, third, and fourth respondents is predicated on both the consent orders. On the construction of the terms of the High Court consent order, the obligation was on the part of the fourth respondent to grant a lease including the right to airspace under s. 63 of the NLC. While, the role of the first, second and third respondents, subject to provisions of the law, was to give effect to the matters stated in the consent order.

[20] However, as shown above, the matter reached the Court of Appeal against the decision of the High Court dismissing an application to fix a time frame for the fourth respondent to grant the lease sought by the applicants.

A At the Court of Appeal, the parties entered into the Court of Appeal consent order which from its terms had clearly varied and further expanded the High Court consent order. The varied part is in respect of the grant of lease and airspace. It is provided that in respect of paras. 1.6 and 1.7 of the High Court consent order, subject to the approval of the sixth and seventh respondents B and the laws in force, the first, second and third respondents shall grant the lease and airspace to the applicants.

[21] Based on the Court of Appeal consent order, the obligation is no more on the fourth respondent but on the first, second and third respondents to grant the said lease under s. 63 of the NLC. The fourth respondent's C obligation was extinguished by the Court of Appeal consent order. Therefore, on the facts of the case, in particular the clear terms of the Court of Appeal consent order, there is no case against the fourth respondent and therefore the applicants are not entitled to any relief against the fourth respondent. The case against the fourth respondent is plainly an abuse of the D process of the court.

[22] What then is the obligation of the first, second and third respondents under the Court of Appeal consent order? As shown above, the obligation is to grant the lease under s. 63 of the NLC subject to the approval of the sixth and seventh respondents and the laws in force. Thus, the obligation is not E absolute but a conditional obligation. However, there is a more important issue. The issue is whether what was agreed by the parties is in accordance with the law, in particular, s. 63 of the NLC.

[23] In this regard, it is crucial to examine s. 63 of the NLC and for that reason, it is apposite to reproduce the entirety of the section which reads as F follows:

> (1) the **State Authority may,** on an application made by the officer for the time being having the control of **any reserved land,** or by any other person or body who has first obtained the approval of that officer, **from time to time grant leases of the whole** or any part G thereof for any period not exceeding twenty-one years.
>
> (2) any lease granted under this section shall be in Form 4E, and any such lease shall have effect subject to such express conditions or other provisions as may be contained therein and, so far as not inconsistent therewith, to any other conditions or provisions which H may be prescribed. (emphasis added)

[24] Summarised, s. 63 provides as follows:

(i) the power to grant leases is with the State Authority;

(ii) the lease must be in respect of reserved land;

I (iii) the application for the lease must be made by the officer having control of any reserve land or any other person or body who has obtained the approval of such officer;

(iv) the lease cannot exceed 21 years; and

(v) the lease must be in Form 4E and is subject to conditions imposed by the State Authority.

[25] The word "reserved land" is defined in s. 5 of the NLC to mean land for the time being reserved for a public purpose in accordance with the provisions of s. 62 of the NLC or of any previous land law. In the instant case, when the lands were compulsorily acquired, the lands reverted back to the State and are vested in the State as State land. Section 62 is important as it provides for certain matters that govern s. 63 of the NLC. Section 62 provides as follows:

(1) the State Authority may by notification in the *Gazette reserve any State land for any public purpose.*

(2) any notification gazetted under sub-section (1) shall:

(a) *describe the reserved land;*

(b) *describe the purpose for which the land is reserved;*

(c) *designate the public officer for the time being having the control of the reserved land;*

(d) be conclusive evidence that the land so described is reserved for a public purpose.

(3) copies of any such notification shall be published in accordance with the provisions of section 433.

(4) without prejudice to the provisions of any other written law for the time being in force, reserved land shall not be:

(a) disposed of by the State Authority except to the extent permitted by, and in accordance with the provisions of, section 63 and Chapters 2, 3, and 4 of this Part, or

(b) used for any purpose other than that for which it is reserved except in pursuance of a disposition made by virtue of any of those provisions. (emphasis added)

[26] From the above provisions, this much is clear to dispose of the instant proceedings against the first, second and third respondents. Firstly, the decision to grant a lease under s. 63 of the NLC is made by the State Authority, not by anyone else. Therefore, the first, second and third respondents or any of them have no jurisdiction to grant leases under s. 63 of the NLC. The State Authority is defined in s. 5 of the NLC to mean "the Ruler or Yang di-Pertua Negeri of the State, as the case may be". The State Executive Council of Selangor ("the State EXCO") in the State of Selangor is the Executive organ that exercises Executive functions in the name of the Ruler. Thus, when an Executive function is to be exercised by the State Authority, such function is carried out by the State EXCO. If authority is

A required, it suffices to refer to *Datuk Bandar Majlis Bandaraya Shah Alam & Anor v. Yusuf Awang & Ors* [2007] 4 CLJ 253, where the Court of Appeal held as follows:

> Thus, in the exercise of his functions under the law, a Ruler of a State shall act in accordance with the advice of the State Executive Council and
B this would of course encompass the powers that a Ruler, as the State Authority, have under the provisions of the Act. As stated by Raja Azlan Shah FJ (as His Highness then was) in *PP v. Datuk Haji Harun bin Haji Idris (No. 2)* [1976] CLJU 97; [1976] 1 LNS 97; [1977] 1 MLJ 15, at p 20:
>
> > It is the Executive Council who is the executive organ of the State
> C Authority and exercises executive functions in the name of the Ruler.

[27] Further, no one, including the first, second and third respondents, can bind the State Authority. The decision of the Federal Court in *Government Of The State Of Negeri Sembilan v. Yap Chong Lan & Ors & Another Case* [1984]
D 2 CLJ 150; [1984] 1 CLJ (Rep) 144 is instructive, where the following is stated:

> It is necessary in the first instance to consider the authority of the Collector to bind the State Authority in making the commitment alleged by the respondents. He had no authority in our view to purport to commit
E the State Authority even if he did give the assurances alleged (*Sidek bin Haji Muhamed & 461 Ors v. The Government of the State of Perak & Ors* [1982] 1 CLJ 244, 314.)

[28] When the NLC provides that any decision is to be made by the State Authority, then the Director of Lands and Mines or the Chief Minister or
F the Land Administrator of a district has no powers to bind the State Authority. Any agreement, even by way of a consent order of a court, is unable to bind the State Authority. Such an agreement is in breach of an express statutory provision of law and would be an illegal agreement.

[29] Further, a separate reason to the above, it is to be observed that at the
G time the Court of Appeal consent order was entered into, the State Authority had not yet, by notification in the *Gazette,* reserved the lands in question as reserve lands under s. 62 of the NLC. Even at the hearing of these judicial review proceedings, no such notification had been made in the *Gazette*. This means that the lands were still vested in the State of Selangor as State land
H pending the notification in the *Gazette*. Thus, until the notification is made in the *Gazette*, no lease can be granted under s. 63, even by the State Authority.

[30] Therefore, to ask this court to grant the reliefs sought against the first, second and third respondents in violation of s. 63 of the NLC would be an
I illegal act. For this reason, I hold that the present judicial review proceedings are an abuse of the process of the court.

[31] The consent orders are final orders. To then ask this court to grant declarations to the effect that the first, second, third and fourth respondents are bound by the terms of the consent order is unnecessary. This is not the purpose of judicial review proceedings. The parties are already bound by the Court of Appeal consent order.

[32] Further, the declarations themselves are against para. 4 of the Court of Appeal consent order which is a conditional order, *ie*, subject to the approval of the sixth respondent and the seventh respondent and the laws that are in force. In such circumstances, this court should absolutely refrain from making the declarations sought against the first, second, third and fourth respondents as such declarations are an abuse of the process of the court.

Review Against The Fifth And Sixth Respondents

[33] On 16 August 2021, the applicants made an application to the fifth respondent, the Highway Authority of Malaysia. The applicants stated that the application was for the approval of a lease under s. 63 of the NLC. This is not true. An examination of the application shows that it was an online application to the fifth respondent for approval for the right of way and use of the land as a private car park and green park beside and under the elevated part of the SUKE project.

[34] The letter rejecting the application dated 31 January 2022 clearly bears this out. The reference of the letter stated as follows: E19: Lebuhraya Bertingkat Sungai Besi-Ulu Kelang (SUKE). Permohonan Aktiviti Penggunaan Right Of Way (ROW) Lebuh Raya Bagi Cadangan Tempat Letak Kenderaan Persendirian Dan Taman Hijau Berhampiran Lot 841, 842, 843, 844, Mukim Ulu Kelang, Daerah Gombak, Selangor Darul Eshan. No. Projek: eptl/SUKE/2021/217.

[35] The application was forwarded by the fifth respondent to the sixth respondent, the Minister of Works. This is because the power lies with the sixth respondent to approve or otherwise such applications under s. 85 of the NLC. Whatever it is, neither the fifth respondent nor the sixth respondent made any decision not to grant a lease under s. 63 of the NLC. The fifth respondent and the sixth respondent did not reject any application for a lease. No such application was made to it.

[36] Therefore, the relief of *certiorari* to quash the decision of the fifth respondent rejecting an application for lease is misconceived in law. Neither can an order of *mandamus* to compel the fifth respondent to grant a lease be made under s. 63 of the NLC when the fifth respondent has no jurisdiction in respect of granting a lease under that section.

[37] It was only on 1 March 2022, that the applicants sent a letter to the fifth respondent referring the paras. 1.6 and 1.7 of the High Court consent order and para. 4 of the Court of Appeal consent order and requested the fifth respondent to comply with the said consent orders. The applicants required

A the fifth respondent to process the application for the consideration of the seventh respondent. But this is not what para. 4 of the Court of Appeal consent order says. For the sake of repetition, it is apposite to reproduce para. 4 of the Court of Appeal consent order which clearly states as follows:

> Bagi perenggan 1.6 dan 1.7 Perintah Persetujuan MT, tertakluk kepada
B kelulusan Pesuruhjaya Tanah Persekutuan, Kementerian Kerja Raya (interchangeable with the 6th respondent) dan undang-undang yang berkuatkuasa, Responden Pertama hingga Responden Ke-3 hendaklah memberi pajakan dan hak yang diperihalkan dalamnya kepada Perayu-Perayu.

C and para. 2 of the letter dated 1 March 2022 which states as follows:

> Mengikut Perenggan 1.6 dan 1.7, Perintah Persetujuan Bermeterai Mahkamah Tinggi tersebut, Lembaga Lebuhraya Malaysia dikehendaki memproses permohonan pajakan menurut Seksyen 63 Kanun Tanah Negara dan pemberian hak ruang udara di atas Kawasan yang diwarnakan
D merah seperti dalam Lampiran 1 yang dikepilkan sebagai mukasurat 2 surat ini. Lembaga Lebuhraya Malaysia dikehendaki memproses permohonan-permohonan untuk pertimbangan Pesuruhjaya Tanah Persekutuan menurut Perenggan 4, Perintah Persetujuan Bermeterai Mahkamah Rayuan bertarikh 07.03.2019.

E **[38]** Clearly, the Court of Appeal consent order does not refer to the fifth respondent at all. Yet, the letter dated 1 March 2022 was sent to the fifth respondent requesting it to comply with something that the Court of Appeal consent order does not require it to do. Thus, there is nothing done by the fifth respondent to review. In the circumstances, I hold that the proceedings brought against the fifth and the sixth respondents are an abuse of the process
F of the court.

The Alternative Remedy Of Temporary Occupation Licence

[39] The applicants submitted that if the lease cannot be granted under s. 63 of the NLC, this court ought to issue an order of *mandamus* to compel
G the first, second and third respondents to grant temporary occupation licence for the land in respect to the lease sought. I hold that this relief is an abuse of the process of the court.

[40] It is trite that the pre-requisites of *mandamus* must be fulfilled before such an order can be made. The pre-requisites are stated in *Peguam Negara*
H *Malaysia v. Dr Micheal Jeyakumar Devaraj* [2011] 9 CLJ 645; *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 10 CLJ 36; and *Chong Kueng Ying & Ors v. Louis Lavagna* [1972] CLJU 18; [1972] 1 LNS 18; [1972] 1 MLJ 180). It suffices to say that the pre-requisites of granting a *mandamus* order are not fulfilled, in particular, there is no provision in any written law that
I imposes a legal duty on the first, second and third respondents to do what the applicants are asking.

[41] The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought. Further, the grant of a temporary occupation licence under the NLC is pursuant to a power and not a duty. This is clear from the wording of s. 65(1) of the NLC, which provides for the granting of a temporary occupation licence in the following words:

> (1) The State Authority **may**, in accordance with the provisions of this Chapter and of any rules under section 14, permit the temporary occupation under licence of -
>
> (a) State land;
>
> (b) mining land not for the time being used for the purposes of mining;
>
> (c) reserved land not for the time being used for the purposes for which it was reserved. (emphasis added)

[42] Thus, when the pre-requisites of the granting of an order of *mandamus* are not fulfilled, this court cannot grant such an order. For this reason, the relief is denied.

Review Against The Seventh And Eighth Respondents

[43] The seventh respondent, the Federal Lands Commissioner, and the eighth respondent, the Majlis Perbandaran Ampang Jaya were not parties in the judicial review proceedings, which resulted in the High Court consent order and the Court of Appeal consent orders. Both the seventh and eighth respondents were named in the body of the consent orders without their knowledge or heard on the matter. In any event, both the seventh and eighth respondents have no jurisdiction to grant a lease under s. 63 of the NLC. That jurisdiction is with the State Authority. The seventh and eighth respondents were unnecessarily made parties to the instant judicial review proceedings.

Conclusion

[44] This court was informed during submissions that the estate of the deceased had commenced land reference proceedings for compensation. In my view, the appropriate relief is compensation for the acquired land according to the remedy provided by art. 13 of the Federal Constitution.

[45] For the above reasons, the application for judicial review was dismissed with costs.